United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2471

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2471

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P/S

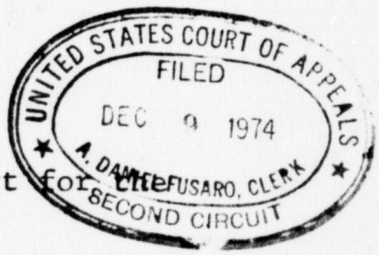
AD-EXPRESS, INC.: REX KITCHEN, as President of AD-EXPRESS, INC.: ANDREW GALLO, Individually and as President of ANDY GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS VARIETY STORE; and PENNY WEBER,

Plaintiffs-Appellants,

-against-

JOHN F. KIRVIN, Supervisor of the Town of Rotterdam, New York; BENJAMIN WOLLNER, FRANCIS L. STONE, PETER LA MALFA, and WILLIAM OSTA, as Members of the Town Board of the Town of Rotterdam, New York; EDWARD LONGO and JOHN LA MALFA, as Town Justices of the Town of Rotterdam, New York; and JOSEPH S. DOMINELLI, as Chief of Police of the Town of Rotterdam, New York,

Defendants-Appellees.



On Appeal from the United States District Court for the Northern District of New York

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BRIEF FOR DEFENDANTS-APPELLEES

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Northern District of New York entered November 6, 1974 upon a decision of the Honorable James T. Foley which held that Local Law No. 13 for the year 1974 of the Town of Rotterdam did not violate appellants' rights under either the First or Fourteenth Amendment to the United States Constitution and, therefore, dismissed appellants' complaint, sua sponte, on the ground that it failed to state a substantial Federal claim.

THE ISSUES

The issues presented by this appeal are:

1. Whether the District Court erred in finding that the claim of appellants on behalf of themselves and others similarly situated that Local Law No. 13 for the year 1974 of the Town of Rotterdam, New York, infringes on their rights under the First and Fourteenth Amendments to the United States Constitution fails to state a substantial Federal question.

2. Whether the District Court erred in finding that the claim of appellants on behalf of themselves and others similarly situated that the exemptions contained in Local Law No. 13 for distributions of advertising material by the U. S. Post Office, newspapers of general circulation and charitable and non-profit organizations violate the Equal Protection clause of the Fourteenth Amendment, fails to state a substantial Federal question.

STATEMENT OF THE CASE

The appellants Ad-Express Inc. and Rex Kitchen, as President of the Ad-Express (hereinafter Ad-Express) are engaged in the business of soliciting and distributing primarily advertising in the form of printed circulars (A7, A49-50).* Appellant Penny Weber is one of a number of independent contractors who deliver Ad-Express' printed circulars (A6). Appellant, Andrew Gallo is a merchant and advertising client of Ad-Express (A5-6).

Ad-Express packages its printed advertising circulars in plastic bags which have a hole at the top to facilitate attachment to any protruding appendage of a home or apartment such as a door knob or lamppost. In some instances, these plastic bags are attached to rural delivery mail boxes by means of a twist-tie or masking tape (A8-9). The technique for distributing these plastic bags containing the printed circulars is to saturate a whole neighborhood weekly or twice weekly.

On or about August 22, 1974 the appellees, John F. Kirvin, Benjamin Wollner, Francis L. Stone, Peter La Malfa and William Osta, constituting the Town Board of the Town of Rotterdam, New York, pursuant to the powers vested in the Town Board by the Town Law of the State of New York (Town Law, §130 et seq.) enacted a certain Local Law No. 13 for the year 1974 entitled "a Local Law Prohibiting the Distribution of Unsolicited Advertising Material

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* Unless otherwise indicated, all references are to appellants' appendix.

in the Town of Rotterdam". By its terms Local Law No. 13 prohibits the distribution of advertising material or samples to any home within the Town of Rotterdam without the written consent of the occupant of such home.* Specifically, Local Law No. 13 provides in pertinent part:

> Section 1. It shall be unlawful for any person to leave hanging any kind of bag or bags containing advertising materials or samples, or to distribute advertising material or samples at a home located within the Town of Rotterdam, New York, other than the home of the person soliciting the same, by placing such material at the home or on the property of the person owning or occupying such home, unless the person distributing such advertising material or samples obtains the written consent of the person occupying the home.
>
> Section 2. The foregoing provision shall not apply to the distribution of advertising materials through the U. S. Postal Services. The provision of this ordinance shall not apply to the distribution of any newspaper of general circulation nor to materials distributed by charitable or non-profit organizations.

A person or corporation that violates this local law is deemed to be guilty of a criminal offense and subjected to a fine of $50.00 for the first offense and $100.00 for any subsequent offenses.

In enacting Local Law No. 13, the appellees determined that the prohibitions contained therein would be in the best interests of the welfare of the residents of the Town of Rotterdam in that the enforcement thereof would prevent (1) the accumulation of

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* Local Law No. 13 for the year 1974 of the Town of Rotterdam is reprinted in the addendum to appellants' brief.

advertising materials on the porches or in the front of homes where the occupants are away for a number of days, thereby eliminating a potential hazard to the security of the home to the extent that such accumulations are public notice to potential intruders and burglars that the house is unoccupied; (2) the nuisance attendant to the retrieving of these advertising materials by the occupant of the home and their disposition; and (3) the potential safety hazard of the plastic distribution bags and/or samples contained therein in the hands of small children (A92).

Local Law No. 13 of the year 1974 became effective on September 10, 1974, and shortly thereafter the appellees undertook the enforcement thereof. Accordingly, on or about September 12 and 16, 1974 ordinance informations were issued to an independent contractor and a supervisory employee of Ad-Express both of whom were making deliveries of plastic bags containing advertising circulars within the Town of Rotterdam without first having obtained the written consent of the person occupying the homes where the deliveries were being made (A52, A95-96, A98-99).*

Subsequently, on or about September 24, 1974 the appellants commenced an action in the District Court for the Northern

* On or about October 17, 1974 these persons, after moving to dismiss the charges lodged against them on the ground that Local Law No. 13 was unconstitutional, entered pleas of guilty (A95-97).

District of New York seeking a judgment declaring Local Law No. 13 unconstitutional and void and permanently enjoining appellees from enforcing the provisions of said local law (A4-20). Simultaneously with the commencement of this action, appellants, by order to show cause containing a temporary restraining order, moved for a preliminary injunction enjoining appellees from enforcing the provisions of Local Law No. 13 pending the disposition of their action for declaratory and injunctive relief (A21-90).

By decision and order dated November 5, 1974 Judge Foley held that Local Law No. 13 for the year 1974 of the Town of Rotterdam did not violate appellants' rights under either the First or Fourteenth Amendment to the United States Constitution and, therefore, dismissed the complaint (A100-A119). ince Judge Foley dismissed appellants' complaint, their motion for a preliminary injunction was denied on the grounds that they had failed to demonstrate the existence of irreparable injury and the probability of success in their underlying action for declaratory and injunctive relief. A judgment was entered on this decision on November 6, 1974 (A120), and the present appeal ensued (A2-3). On or about November 10, 1974 the United States Court of Appeals for the Second Circuit issued an injunction against the enforcement of Local Law No. 13 pending this appeal.

ARGUMENT

POINT I - LOCAL LAW NO. 13 FOR THE YEAR 1974 OF THE TOWN OF ROTTERDAM DOES NOT CONSTITUTE AN IMPERMISSIBLE INFRINGEMENT ON FIRST AMENDMENT RIGHTS.

Freedom of speech and freedom of press, which rights necessarily embody the means used for their dissemination, are protected by the First Amendment to the United States Constitution from infringement by Congress and since these rights are fundamental personal rights and liberties they are protected by the Fourteenth Amendment from invasion by State action (Lovell v. Griffin, 303 U. S. 444 [1938]). Accordingly, municipal ordinances which are adopted pursuant to State enabling statutes are within the prohibition of the First Amendment (Schneider v. Town of Irvington, 308 U. S. 147 [1939]).

Although freedom of speech and press are preferred rights which enjoy special constitutional protection, it has been recognized that such protection will not deter the enactment of governmental regulations which result not in the absolute prohibition of their exercise but in limitation as to the manner, or time or place of exercise (Kovacs v. Cooper, 336 U. S. 77 [1949], Lovell v. Griffin, supra). The test to be applied in determining the constitutionality of a governmental regulation of the rights of freedom of speech and press is whether or not the purpose and effect of the regulation substantially outweighs

the impingement on the exercise of these freedoms (Shelton v. Tucker, 364 U. S. 479 [1960]).

Municipal ordinances regulating or prohibiting the distribution of handbills, circulars, samples and other advertising matter have generally been held by the courts to constitute a valid exercise of the police power (see generally, 22 ALR 1484; 114 ALR 1446). In Buxborn v. City of Riverside (29 F. Supp. 3 [D.C.S.D. Cal. 1939], the plaintiff, who was engaged in the business of distributing advertising or other leaflets for hire, sought an injunction against the enforcement of an ordinance which, among other things, provided that it shall be unlawful for any person to distribute any advertising literature of any kind or any advertising sample or device to any house or other private property without first having obtained the permission of the owner or of an adult resident or occupant thereof, on the ground that the ordinance violated his rights under the First Amendment. The court, however, after recognizing that limitations on the time and place of distribution and prohibitions aiming to prevent the annoyance of citizens and the misuse or littering of public streets had been given unequivocal judicial sanction, rejected plaintiff's constitutional challenge stating (supra pp. 6-7):

> * * * [T]he right to distribute literature and pamphlets does not imply the right to 'force' acceptance by placing them on another person's

premises without his permission.

> Governmental agencies may protect a property owner in the enjoyment of his property. They may ward off those who would annoy him by trespassing on it in one way or another.
>
> * * *
>
> [T]he occupant of the premises may have the full benefit of limitless distribution by indicating his consent directly to the particular distributor, or, generally by placing upon his premises a sign indicating that 'all distribution is welcome'.
>
> There is no more inconvenience in this than in the customary 'No solicitors or peddlers' signs by which persons shield their privacy.
>
> Nor is any constitutional norm violated when he who would spread literature or advertising on private premises is compelled to obtain the owners' consent. A man's home is still his castle.
>
> If governmental agencies may aid the enjoyment of people's homes by zoning ordinances * * * [I]t is incomprehensible how the right to print and distribute freely may be broadened into absolute freedom to invade another's property by littering his premises without his consent.

Likewise, in Sunday Mail Inc. v. Christie (312 F. Supp. 677 [D.C.C.D. Cal. 1970]) the court, relying upon the United States Supreme Court's decision in Breard v. City of Alexandria, (341 U. S. 622 [1951]), held that a city ordinance which prohibited the distribution of printed matter on private residential property without the express consent of the owner was not unconstitutional as violative of the First and Fourteenth Amendments to the United States Constitution. (see also, Van Nuys Publishing Co. v. City of Thousand Oaks, 92 Cal. Rptr. 76 [1971];

Di Lorenzo v. City of Pacific Grove, 67 Cal. Rptr. 3 [1968]; People v. Walkenhorst, 59 Misc. 2d 563 [1969]; and see generally, 1 Antieau, Modern Constitutional Law, §1:27 pp. 54-56).

In Breard v. City of Alexandria (supra), the Supreme Court held that a municipal ordinance which forbade one to go in and upon private residential property for the purpose of soliciting orders for the sale of goods without prior consent of the owners or occupants was not invalid under the due process clause of the Fourteenth Amendment and that it did not abridge the freedom of speech and press guaranteed by the First and Fourteenth Amendments. Specifically, as to the challenges to the ordinance under the First and Fourteenth Amendments the court stated (supra p. 642):

> The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life.
>
> * * *
>
> We think those communities that have found [certain] methods of sale obnoxious may control them by ordinance. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. [interpolation mine]

In arriving at the conclusion that an ordinance which bans solicitors and peddlers, including those of printed matter, from

invading private residences without the request or invitation of the householder, the Supreme Court distinguished its decision in Martin v. City of Struthers (319 U. S. 141 [1943]), where it held invalid, as a denial of freedom of speech and press, an ordinance which forbade any person to summon to the door the occupants of any residence for the purpose of distributing handbills as applied to a person distributing advertisements for a religious meeting on the ground that such an ordinance substitutes the judgment of the community for the judgment of the individual householder (cf. Watchtower Bible & Tract Soc. v. Metropolitan Life Ins. Co., 297 N. Y. 339; People v. Bohnke, 287 N. Y. 154), and its decision in Marsh v. Alabama (326 U. S. 501 [1946]), where it held that a state could not impose criminal punishment on a person for distributing religious literature on the sidewalk of a company-owned town, on the ground that since the streets were freely accessible to and freely used by the public in general, such streets were in the same legal position as public streets and other public places in a municipality (see Schneider v. Town of Irvington, 308 U. S. 147 [1939], supra; Lovell v. Griffin, 303 U. S. 444 [1938], supra).

In determining First Amendment rights, a distinction has to be made between communications transmitted to willing recipients and messages forced upon those who do not wish to receive them (Martin v. City of Struthers, 319 U. S. 141 [1943], supra).

Local Law No. 13 of the year 1974 for the Town of Rotterdam, like the ordinances involved in the Buxborn, Christie and Breard cases, merely prohibits the distribution of advertising material without first having obtained the consent of the occupant of the home within the Town where delivery is sought to be made. There is no attempt to substitute the judgment of the community for that of the individual homeowner (see Martin v. City of Struthers, supra). Nor does the Local Law ban the distribution of such advertising material on public streets to those who are willing and desirous of receiving such material. Furthermore, there is no requirement in Local Law No. 13 for the securing of a license and payment of a tax prior to the distribution of the advertising material and the Town makes no attempt to pass judgment on who may distribute such material (see Murdock v. Pennsylvania, 319 U. S. 105 [1942]).

As hereinbefore observed, the purposes underlying the enactment of Local Law No. 13 of the year 1974 are (1) the prevention of burglaries which might be occasioned by the accumulation of uninvited advertising material at a residence during the occupants absence; (1) the prevention of litter; (3) the prevention of injury to small children which might be occasioned by the distribution of plastic bags and/or the samples contained therein; and (4) the prevention of annoyance to the residents of the Town.

It is submitted that these purposes are legitimate and substantial and that they are not being pursued by means that broadly stifle fundamental personal liberties. Contrariwise, it is submitted that Local Law No. 13 of the year 1974 for the Town of Rotterdam is reasonably and narrowly drawn in that appellant Ad-Express is permitted to solicit consent from the occupant of any home within the Town and thereon distribute its plastic bags containing advertising circulars and/or samples to any homeowner who will accept it.

In addition, not only is Local Law No. 13 reasonably and narrowly drawn to achieve the end sought thereby, but it should be observed that by its terms Local Law No. 13 attempts to regulate only the distribution of advertising material and samples and that there is no attempt to regulate newspapers of general circulation and distributions by charitable and non-profit organizations.

It is established that commercial messages do not come within the orbit of First Amendment and may be regulated or prohibited by the Government in the same manner as other business affairs. (See Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191 [1965]; 41 Brooklyn L. Rev. 60 [1974]. In Valentine v. Christensen (316 U. S. 52 [1942]) a city ordinance that banned distribution in the streets of commercial and

business advertising matter was held not to be violative of First Amendment rights, the court stating (Id at 54-55):

> This court has unequivocably held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, and matters for legislative judgment.

While the Valentine decision may have been subsequently weakened in some respects (see e.g. Commarano v. U. S., 358 U. S. 498, 513-515), the commercial free speech doctrine was revitalized in Pittsburg Press Co. v. Pittsburg Comm. on Human Rights (413 U. S. 376 [1972]. See also, Rockville Reminder Inc. v. United States Postal Service, 480 F. 2d 4 (2d Cir. 1973), Gannett Co. v. City of Rochester, 69 Misc. 2d 619; People v. Skottandal, 104 NYS 2d 583; Lehman v. City of Shaker Heights, 296 N E 2d 683 [Ohio, 1973]). The Pittsburg Press case (supra), involved an ordinance which, among other things, prohibited the publication and circulation of employment advertisements discriminating according to sex. Pursuant to this ordinance, the Pittsburg Press had ceased to arrange its classified employment advertisements according to the column headings, "Help Wanted -

Male" and "Help Wanted - Female", and substituted in their stead, "Jobs - Male Interest" and "Jobs - Female Interest". Additionally, the Pittsburg Press printed a disclaimer which provided, among other things, that notwithstanding the column headings, "job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination". Upon complaint by the National Organization for Women, the Pittsburg Commission on Human Relations enjoined the Pittsburg Press from continuing the practice of listing jobs according to separate column headings. The trial court modified the Commission's order so as to prohibit classification only of jobs that were subject to the ordinance. And, on appeal, the United States Supreme Court affirmed, in a 5-4 decision based exclusively upon First Amendment considerations. Justice Powell, writing for the majority, found that none of the advertisements

> express[ed] an opinion on whether, as a matter of social policy, certain positions ought to be filled by members of one sex or the other, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.

The majority also rejected arguments that (1) liberty of circulation was infringed by potential decrease in advertising, (2) the Pittsburg Press had exercised editorial judgment in deciding where and how to place the advertisements, the injunction thus violating freedom of press as to that judgment; and

(3) Valentine v. Christensen should be overruled, or at least limited to its facts.

Here, as previously observed, it is undisputed that Local Law No. 13 seeks only to prohibit, without consent, the distribution in plastic bags or otherwise, of advertising material and/or advertising samples, that is, commercial advertising. And, there is no attempt made to regulate the content of this material. Consequently, since Local Law No. 13 is reasonably and narrowly drawn to protect the safety, health and general welfare of the inhabitants of the Town of Rotterdam and further since it relates only to commercial advertising, it is submitted that it does not unconstitutionally infringe on appellants' First Amendment rights.

The appellants' reliance on Toms River Publishing Co. v. Borough of Brielle (____ F. Supp. ____ [D. N. J. 1974]), is misplaced since in that case the court construed the ordinance involved to be a prohibition against the distribution of newsprint of any kind, including material of newsworthy content. Specifically, the court stated:

> The ordinance here under consideration has no regard for the type of literature to be distributed by nature or content, but by its language prohibits the unauthorized dissemination of any newspaper, magazine, handbill, pamphlet * * * or any other paper of commercial nature or otherwise * * *. Furthermore, with the possible exceptions of hand-to-hand delivery and paper pick-up points, it prohibits all forms of distribution. It matters not whether the content is religious, political

> social, or commercial in nature, or whether the literature is distributed on a daily, weekly, or one time basis. Presumably, this would prohibit distribution of political leaflets in advance of local, state and national elections without first having obtained permission from each owner or adult occupant of Borough residences.
>
> The impact on First Amendment rights caused by the overbreadth of this ordinance is unnecessary. A more narrowly drawn ordinance would accomplish the same result * * *.

Local Law No. 13, unlike the ordinance involved in the Toms River case, is not overboard, but rather is narrowly drawn to protect the health, safety and general welfare of the residents of the Town of Rotterdam. Moreover, appellants' attempt to distinguish the Breard case on the ground that the ordinance involved in that case dealt only with the solicitation of subscriptions by house-to-house canvass without invitation has previously been rejected by the courts (see, Valentine v. Christensen, 316 U. S. 52 [1942] revg. 112 F. 2d 511 [2d Cir. 1941]; and see, also, 41 Brooklyn L. Rev. 60, 64-67 [1974]).

POINT II - LOCAL LAW NO. 13 OF THE YEAR 1974 FOR THE TOWN OF ROTTERDAM IS NOT UNCONSTITUTIONAL AS A DENIAL OF EQUAL PROTECTION OF LAWS.

The Fourteenth Amendment to the United States Constitution provides, inter alia: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

In regulating private enterprise and the use of private property, a state or local government is subject to the limitations inherent in the equal protection clause of the Fourteenth Amendment.

In 1911 the Supreme Court summarized its basic rules on equal protection as follows (Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 [1911]):

> 1. The equal protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any rational basis, and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.
>
> 3. When the classification in such law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

These statements are equally controlling today (see, Village of Belle Terre v. Borass, ____ U. S. ____ [1974]; Geduldig v. Aiello, ____ U. S. ____ [1974]; United States Department of Agriculture v. Moreno, 413 U. S. 538 [1973]; Frontiero v. Richardson, 411 U. S. 677 [1973]). But, where a particular legislative classification involves a fundamental personal right guaranteed by the Constitution such as voting, right of association, right of access to the courts, right to travel, any rights of privacy or right against discrimination on the basis of sex, race, alienage and national origin as opposed to social or economic rights it seems that the court will now apply a stricter standard of judicial scrutiny, namely, whether the burden imposed by the classification is necessary to protect or compelling and substantial governmental interest (see, Village of Belle Terre v. Borass, supra, and cases cited therein). Under this standard, once it is determined that a particular legislative classification impinges upon a fundamental personal right the onus of demonstrating that no less intrusive means will adequately protect the compelling State interest and that the challenged legislation is sufficiently narrowly drawn is upon the party seeking to justify the intrusion (see, Memorial Hospital v. Maricopa county, ___ U.S. ____ [1974]).

Although it cannot be gainsaid that freedom of speech and press are fundamental personal rights, it is submitted that since Local Law No. 13 is concerned only with commercial advertising the "traditional" equal protection analysis should apply and, therefore, the legislative classification must be sustained unless it is patently arbitrary and bears no rational basis to a legitimate governmental interest.

As hereinbefore observed, Local Law No. 13 applies only to those persons who are engaged in the business of house-to-house distribution of commercial advertising material and exempts from its operation distribution through the United States Postal Service, delivery of newspapers of general circulation and materials distributed by charitable or non-profit organizations. The Supreme Court has observed:"[D]istinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved" (Morey v. Doud, 354 U. S. 457, 465 [1957]). Moreover, that court has repeatedly recognized that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (Williamson v. Lee Optical of Oklahoma, 348 U. S. 483, 489 [1955]).

In the instant case, it is submitted that the legislative classification is neither capricious nor arbitrary, and has some

reasonable basis, considering the different characteristics of the businesses involved, to the purposes of Local Law No. 13.

As Judge Foley observed in his decision (A109-111):

> [Appellants] admit that these [plastic] bags are hung to saturate a given neighborhood, without regard to whether anyone will assume responsibility for them after delivery. The bags may be taken by the presumed distributee; or, if not, it is not difficult to envision their deterioration or scattering by wind, rain, sun or snow. Thus, the problem of littering is real and would pose difficult problems to the town. To wit, is the distributor at fault for introducing the litter of these bags and their contents into the neighborhood or is the resident responsible for not accepting responsibility for unsolicited appendages to his home? (citation omitted). Furthermore, the danger forseen by the drafters of this ordinance, that the plastic bags or sample contents therein will find their way into the hands of children when they are so readily accessible and untended is a legitimate concern of local government and one unquestionably subject to legislative enactment to minimize it.
>
> The security problem to residential homes, an ever growing problem in these times, is in the same category. The very presence of these materials in plain view upon a home or apartment door might very well publicly announce the absence of the occupant to the wrong kind of people, especially when they are delivered weekly or more frequently and allowed to gather (citation omitted).
>
> Finally, aesthetics are also a well recognized concern of local and State government and may properly be the subject of the local police power. (interpolation mine).

Moreover, as to the exemption of distributions through the United States Postal Service, it should be observed, that, without consent, States or local governments have little authority under concepts of federal supremacy to regulate the United States Postal Service (see, Morey v. Doud, supra; Rockville Reminder Inc. v.

United States Postal Service, 480 F 2d 4 (2d Cir. 1973), supra; Currency Services Inc. v. Matthews, 90 F. Supp. 40 [D. C. Wis. 19]). And, as to the exemptions for newspapers of general circulation and charitable or non-profit organizations it should be observed that not only to persons ordinarily subscribe to newspapers of general circulation but, more importantly, distributions by either newspapers of general circula haritable or non-profit organizations, unlike distributions b commercial advertisers, would generally contain material that comes within the orbit of the First Amendment. Accordingly, it is submitted that the legislative classification contained in Local Law No. 13 is rationally related to a legitimate governmental interest and, therefore, the classification does not deny appellants equal protection of laws (see generally, 41 Brooklyn L. Rev. 60, 67-71 [1974], supra).

CONCLUSION

THE JUDGMENT DISMISSING APPELLANTS' COMPLAINT FOR FAILURE TO STATE A SUBSTANTIAL FEDERAL QUESTION ON THE GROUND THAT LOCAL LAW NO. 13 OF THE YEAR 1974 FOR THE TOWN OF ROTTERDAM IS NOT UNCONSTITUTIONAL SHOULD BE AFFIRMED.

Respectfully submitted,

Michael J. Volpe, Town Attorney,
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Attorney for Defendants-Appellees
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Vinewood Avenue
Schenectady, New York 12306

December 6, 1974

STATE OF NEW YORK, COUNTY OF SCHENECTADY SS: AFFIDAVIT OF SERVICE BY MAIL

Eunice Esposito, being duly sworn, deposes and says: that she is over the age of 18 years; that she served the within Briefs upon the following attorney at the following time and place in the following manner: December 6, 1974

Gerald A. Dupuis, Esq.
c/o Miller & Summitt
90 Broad St.
New York, N.Y. 1005

by depositing a true and correct copy of the same properly enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States at Vinewood Avenue, Rotterdam, N.Y., directed to said Attorney, respectively, at said address, respectively mentioned above, that being the address within the state designated for that purpose upon the last papers served in this action or the place where the above then resided or kept offices, according to the best information which can be conveniently obtained.

Eunice Esposito
Eunice Esposito

Sworn to beofre me, this 6th day of December, 1974

Olive Ann Haydock
Notary Public - ~~Commissioner of Deeds~~
Commission Expires 3/30/75